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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 589

NORTHERN ILLINOIS COAL CORPORATION,
Petitioner,

vs.

MIDWEST-RADIANT CORPORATION,
Respondent.

OPPOSING BRIEF OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

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OPPOSING BRIEF OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

Petitioner's "Summary Statement of the Matter Involved" is incomplete and misleading. Respondent therefore supplies the following statement of facts. *These* were the facts upon which the Court of Appeals relied in its construction of the Keim-Thomas instrument, as will be noticed in reading the opinion found in 171 Fed. 2nd 635 and in the transcript at page 374.

STATEMENT OF THE CASE.

On March 20, 1902, and prior thereto, Augusta Keim, a widow, owned in fee simple and was in possession of an eighty-acre farm situated near Lenzburg, in St. Clair County, Illinois. On that day she executed the instrument involved in this case (Pltf's. Exhs. 3 and 18, Trans. 18, 250, 67).

Thomas, named as the "grantee" in the Keim instrument, then and ever since has resided in Missouri. He was a promoter and engaged in putting together a block of land in the vicinity of Lenzburg, Illinois, with the purpose of prospecting for coal, and with the hope of obtaining the financial support necessary to develop and operate a mine if coal in satisfactory quantity and quality was found. When the Keim instrument was executed he had not determined where his prospecting operations would begin. Thomas never paid Augusta Keim any money for this instrument except, perhaps, the $1.00 recited therein (Pltf's. Exhs. 6, 7 and 11, Trans. 153-157, 171, 301, 307). Seven weeks later he obtained from William Prediger a bond for deed for a ten-acre tract of land one-fourth mile west of the Village of Lenzburg, and a half mile distant from the Keim farm, the condition of which was that Thomas was to sink a coal shaft thereon (Trans. 171). Some time thereafter Thomas did commence sinking a shaft on the Prediger land; he spent approximately $3,000 of his own funds in so doing, and local citizens contributed additional money, material and services used in sinking the shaft (Trans. 301). Thomas did not place said shaft in operation as a mine; he abondoned the shaft on the Prediger land in the latter part of 1902 or early in 1903; he did not begin or sink any other mine at Lenzburg or in

the vicinity thereof (Trans. 171, 301, 307). After Thomas' mining enterprise collapsed, the record contains no intimation of Thomas ever being seen in the vicinity of Lenzburg again.

Thomas never sunk a mine upon the Keim land or mined or removed any coal therefrom, or entered upon or took actual possession of the coal thereunder, or made any payment of royalty to Augusta Keim, or anyone claiming under her (Trans. 80, 81, 302). He never paid any taxes on the coal under the Keim land (Trans. 70).

Augusta Keim continued in possession of her farm until July 16, 1909, when she conveyed it by warranty deed to Ernest W. Hentze, predecessor in title of the defendant John W. Hentze (Trans. 80). This deed contained no reservation or exception of the coal or any mineral estate, but warranted the title to the entire fee (Trans. 133). Ernest W. Hentze took possession of the farm, and this farm since that time has at all times been in the exclusive possession of members of the Hentze family (Trans. 83, 84).

On October 5, 1944, the Hentzes, as lessors, entered into an agreement with respondent, as lessee, whereby in consideration of the payment by respondent of earned royalties of 8 cents per ton of coal mined, and advance royalty payments of $2,400 in cash per year for ten years or until the coal was actually mined therefrom, the Hentzes leased their farm to respondent for a term of thirty years for the purpose of mining coal. This lease was recorded on October 14, 1944 (Pltf's. Exh. 5, Trans. 146, 308). Immediately thereafter, on November 27, 1944, Northern Illinois Coal Corporation, for a recited consideration of $10.00, procured from Thomas a quitclaim of the interest which he had acquired by the Keim instrument, and whatever tagends remained of his 1902 promotion (Trans. 155). This quitclaim was recorded on November 30, 1944; it affords,

alone, the basis for the tenuous claim of ownership of the coal asserted by Northern Illinois Coal Corporation, which has not attempted to take possession of, mine or remove the coal under the Hentze farm (Pltf's. Exh. 7, Trans. 155, 315).

SUMMARY OF ARGUMENT.

I.

The Decision of the Court of Appeals Does Not Involve Important Questions of General Illinois Real Estate Law. The Court Merely Applied Settled Rules of Construction to Determine the Intention of the Parties to a Particular Instrument and, Consequently, Its Legal Effect.

II.

The Court Should Follow Its General Policy of Leaving Undisturbed a Holding by the Court of Appeals On a Question of State Law Where Plain Error Does Not Appear.

III.

Even if a Difficult Problem of Local Law Had Been Involved in This Case, It Was Not One Which Should Have Been Remitted to the State Courts for Decision.

ARGUMENT.

I.

The Decision of the Court of Appeals Does Not Involve Important Questions of General Illinois Real Estate Law. The Court Merely Applied Settled Rules of Construction to Determine the Intention of the Parties to a Particular Instrument, and, Consequently, Its Legal Effect.

Petitioner repeatedly admits in its petition and brief that the only problem which the Court of Appeals had was the construction of the Keim-Thomas instrument of 1902 (pp. 6, 11, 21, 31).

Petitioner contends, however, with total inconsistency, that because the Keim-Thomas instrument was to be void unless certain events occurred, the instrument was, under Illinois law, a deed upon condition subsequent, and that the Court was, therefore, powerless to do anything but declare it such, no matter how clear the intention of the parties to the contrary may have been. In developing its argument on this contention petitioner says that the Keim-Thomas instrument is "a typical mining conveyance under the Illinois law," that the provision therein that

> "grantee to commence sinking a mine at Lenzburg in six months from this date and have same in *opperation* in one year from this date or this deed is to be void"

is a "protective clause * * * habitually inserted in mineral conveyances in Illinois" * * * "for the protection of the grantor," and that this type of "protective clause" has been so consistently held by the Illinois Courts to create an estate upon condition subsequent as to establish an Illinois rule of property by which the Court is bound.

Obviously under this contention of petitioner there would be no problem of construction, but merely a process of classification.

Illinois decisions do not disclose that there is *any typical form* of mining conveyance. Practically, the form of the instrument used to express the grant of a conditional mineral estate varies with the varying bargain of the contracting parties; the instrument is fashioned to fit the agreement made and to express the intention of the parties. Nor is a so-called "protective clause" in the form found in the Keim-Thomas instrument *habitually* inserted in instruments granting mineral estates in Illinois; *it is not found in any case upon which petitioner relies.* There are no words or phrases in this instrument having such definite legal significance as to exclude construction for the purpose of determining the intention of the parties.

The problem of determining the legal effect of the Keim-Thomas instrument is not, therefore, one of classification; the problem is one of construction and the rules of construction to be applied are those which are entirely familiar to Illinois lawyers and judges.

1. Under Illinois law, the fact that certain words or phrases may have been held, in some cases, to create a condition subsequent, does not mean that the same words or phrases appearing in another instrument must necessarily also create a condition subsequent. In the latter case the circumstances surrounding the parties, the objects which they were seeking to attain, and their own practical construction may be different and indicative of an intention to create a condition precedent rather than a condition subsequent. If so, such intention and not mere isolated phrases will prevail. In *Nowak* v. *Dombrowski*, 267 Ill. 103, 107, the court said:

> "* * * No technical or precise words are used to distinguish a condition precedent from a condition sub-

> sequent. The same words may create either, according to the rules of construction and the intent of the parties to the instrument. * * * In all cases it is a question of intention and not of phrase or form. * * * The intent, when apparent and not repugnant to any rule of law, will control technical terms, for the intent, and not the words, is the essence of every agreement."

To the same effect, see:

Maguire v. *City of Macomb,* 293 Ill. 441, 448.

2. In striving to ascertain the intention of the parties, the instrument will be viewed as a whole and particular words will never be "isolatedly considered." As was said in *Walker* v. *I. C. R. R. Co.,* 215 Ill. 610, 618:

> "* * * it is not permissible to select a few words from the instrument and base a construction thereof upon a consideration of those words alone, but the entire instrument should be considered. An elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties and the intention which they have manifested in forming them."

Where the question is one of construction of a deed or other instrument, the Illinois view is that each case must rest on its own particular facts and circumstances. *Kinder* v. *La Salle County Coal Co.,* 310 Ill. 126, 134.

3. The Illinois approach in the construction of deeds and other instruments is broad and liberal. The prime objective is to ascertain what the parties really and actually intended, and then to give effect to that intention unless to do so would violate some rule of law or public policy. Technical matters of form yield to substance. Thus in *Henry* v. *Metz,* 382 Ill. 297, 300, the Illinois Supreme Court characterizes the general Illinois approach as follows:

> "In ascertaining and giving effect to the intent of the parties to a deed, the courts are not confined to a strict and literal construction of the language used, when to do so would frustrate the intent of the parties."

And in *Magnolia Petroleum Co.* v. *West*, 374 Ill. 516, 520, the Court said:

> "* * * The words need not be construed literally or strictly, since greater regard is accorded to the real intention as manifested in the entire deed than to any particular word or arrangement in its expression."

This broad and liberal approach in the construction of deeds and other instruments has been reaffirmed in the most recent expressions of the Illinois Supreme Court. *Shadden* v. *Zimmerlee*, 401 Ill. 118.

4. In seeking the intention of the parties, the Court will place itself as nearly as possible back in their situation at the time the instrument was entered into, consider surrounding circumstances, the subject matter involved, and the objects which they had in mind. *Goodwillie Co.* v. *Commonwealth Electric Co.*, 241 Ill. 42; *Adams* v. *Gordon*, 265 Ill. 87, 91; *Texas Company* v. *O'Meara*, 377 Ill. 144, 151.

5. In construing doubtful terms or provisions of deeds or other written instruments, the Illinois courts accord decisive weight to the practical construction of the parties themselves. In *Walker* v. *I. C. R. R. Co.*, 215 Ill. 610, 619, the Court said:

> "* * * It is allowable always to look to the interpretation the contracting parties place on their agreement, either contemporaneously or in its performance, for assistance in ascertaining its true meaning. No extrinsic aid can be more valuable. (*Vermont Street M. E. Church* v. *Brose*, 104 Ill. 206.) A reasonable construction placed upon an indefinite or uncertain contract by the conduct of the parties will be adopted by the courts. *Work* v. *Welsh*, 160 Ill. 468."

and in *Law* v. *Kane,* 384 Ill. 591, 596, the Court said:

> "* * * Where the deed contains ambiguous language, a reasonable interpretation by the parties, themselves, found in their contemporaneous or subsequent acts and declarations, will generally be adopted. (*Williams* v. *Swango,* 365 Ill. 549.)"

See also *Hollenbeck* v. *Hollenbeck,* 232 Ill. 384; *Magnolia Petroleum Co.* v. *West,* 374 Ill. 516; *Storey* v. *Storey,* 125 Ill. 608, 613. The practical construction placed on an instrument by a party thereto is binding on one claiming as his successor in title. *Goodwillie Co.* v. *Commonwealth Co.,* 241 Ill. 42, 73.

The decision of the Court of Appeals did not, therefore, enunciate a new rule of general Illinois real estate law. The Court merely applied settled local rules of construction to determine the intention of the parties to the particular instrument before it, and, consequently the legal effect of that instrument.

The whole tenor of petitioner's contention is, as it was in the Court of Appeals, directed toward shutting out any real inquiry into what the parties actually intended. The rules in Illinois with respect to this question required such inquiry.

When Thomas abandoned his mining venture at Lenzburg in 1903, he went back to Missouri and never returned. He remained completely indifferent to everything that occurred thereafter. He paid no royalties. He paid no taxes. He did not, for 40 years, assert the existence of any property right. Mrs. Keim and her grantees dealt with the property as if Thomas had no interest in it of any character.

The Court of Appeals was justified in giving the effect it did to the practical construction placed upon the instrument by the parties, and in concluding, as it did, that (171 F. 2d, at page 640):

> "It is clear from this record that insofar as Thomas' relation with Mrs. Keim was concerned, Thomas construed the instrument as a mere prospective arrangement whereby he had the right to absolve himself from all obligations to her by electing not to go ahead with placing a mine in operation at Lenzburg before March 20, 1903; that as a result of his election the instrument was rendered void and consequently he was released from all obligations thereunder. Mrs. Keim and her successors in title acquiesced in this construction and not only acted thereon, but changed their position in reliance upon Thomas' interpretation of the instrument as one which he could nullify under the abandonment clause, and both of them treated the instrument as having become void upon Thomas' abandoning in 1903 the shaft he had sunk on the Prediger land. Mrs. Keim never asserted against Thomas any right predicated upon the instrument, and Thomas went his way for over forty years as if the instrument had never been executed."

None of the cases relied upon by petitioner suggests the proper construction of the instrument in question, or affords valid basis for contention that the Court of Appeals erred in its method of application of settled Illinois rules of construction.

The provision in *Manning* v. *Frazier*, 96 Ill. 279, upon which petitioner leans so heavily, and which petitioner calls "the protective clause of that deed," was not a condition but a covenant upon the part of the grantee which bound him unconditionally to mine the coal conveyed, and specifically limited his right to abandon mining operations to the time when the coal should be exhausted. There was no question in that case of a conveyance upon condition subsequent or precedent; the only question decided was that a vendor's lien attached to unmined coal conveyed to the grantee for the purchase price of coal that had been mined.

There is nothing in the *Manning* case which even sug-

gests how the present case should be decided. In the *Manning* case a present estate in fee was necessary to enable the grantee to perform his agreement to mine the coal. In the instant case Thomas was not bound under his agreement with Mrs. Keim to mine any coal at any time. Neither Mrs. Keim nor Thomas intended that Thomas should have any estate in the coal under her land unless he became entitled to it by performance of the condition.

Manning v. *Frazier* is the only case relied upon by petitioner which involved a mineral or sub-surface estate. The condition expressed in the instruments construed in *Sherman* v. *Town of Jefferson,* 274 Ill. 294, *Plummer* v. *Worthington,* 321 Ill. 450, and *Sanitary District* v. *Chicago Title and Trust Co.,* 278 Ill. 529, which petitioner refers to as "protective clauses" were each properly construed by the Court as conditions subsequent; this was required to give effect to the plain intention of the parties. The grant of a present estate was necessary to effectuate the purpose of the conveyance. But the fact that the conditions in the deeds construed in those cases were held to be subsequent does not argue that it is the law in Illinois that every instrument which provides that it is to be void in the event of the non-performance of a provision therein is a deed upon condition subsequent. On the contrary the rule is as clearly stated in *Nowak* v. *Dombrowski,* 267 Ill. 103, 107, quoted above at pages 6 and 7 of this brief.

II.

The Court Should Follow Its General Policy of Leaving Undisturbed a Holding On a Question of State Law Where Plain Error Does Not Appear.

This Court has frequently stated that unless plain error appears in the decision of a Court of Appeals on a question of local law, the lower court's decision will not be dis-

turbed. *Francis* v. *Southern Pacific Co.*, 333 U. S. 445; *Helvering* v. *Stuart*, 317 U. S. 154, 164, 165; *Palmer* v. *Hoffman*, 318 U. S. 109, 118. No plain error appears in the decision of the Court of Appeals in this case. Two of the three judges who composed the Court have long been residents and lawyers of Illinois. The opinion of the Court of Appeals was written by a judge who was for many years an Illinois circuit judge and a justice of the Illinois Appellate Court, and then was Attorney General of Illinois. Another justice of the Court of Appeals was also formerly an Illinois circuit judge.

This Court's language in *Spiegel* v. *Commissioner of Federal Revenue*, No. 3, October Term, 1948, decided January 17, 1949, 17 L. W. 4137, is particularly appropriate:

> "The record reveals that the state law problem here is not an easy one, but under this Court's decision in *Meredith* v. *Winter Haven*, 320 U. S. 228, the difficulty involved did not relieve the Court of Appeals of its duty to make a decision. The questioned ruling was made by three judges who are constantly required to pass upon Illinois law questions. One of the three judges has long been a resident and lawyer of Illinois. Examination of the Illinois state court opinions pressed upon us leaves us unable to say with any degree of certainty that the Court of Appeals holding was wrong. * * * It is sufficient for us to say that we think reasonable argument can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state law."

Illinois cases in abundance clearly support the decision of the Court of Appeals. Therefore, this Court, following its general policy, should not disturb that decision.

III.

Even If an Unsettled Problem of Local Law Had Been Involved in This Case, It Was Not One That Should Have Been Remitted to State Courts for Decision.

Petitioner steadfastly sought a federal court determination of this case in its favor through 3½ years of costly and protracted litigation. Petitioner adheres to that objective throughout most of its brief in this Court. Then suddenly petitioner suggests that the case should be remitted to the state courts, claiming the legal question involved is one of first impression in Illinois and should, therefore, petitioner claims, be decided initially by an Illinois court. Perhaps this contradictory approach is of itself sufficient to require denial of the petition.

Federal courts do not decline (as petitioner urges) to decide an unsettled question of local state law. Rather, as this Court said in *Meredith* v. *Winter Haven*, 320 U. S. 228, 237, which involved a matter of unsettled Florida law:

> "*Erie R. Co.* v. *Tompkins, supra,* did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, this Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state has not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain."

All cases cited by petitioner on this point are merely exceptions to the above mentioned rule and each case which petitioner cites is discussed as an exception in the *Winter*

Haven case. These exceptions involve a refusal of federal courts to pass upon, for example, state statutes or orders of state administrative bodies, or to shape policy of state administrative agencies, until after a state court acts thereon. None of the exceptions mentioned in the *Winter Haven* case exists in the instant case.

Petitioner suggests on page 21 of its petition that some proceeding is pending in a state court affecting the real estate here involved. No such point was presented in the District Court or in the Court of Appeals and petitioner concedes that its statement is wholly unsupported by the record before this Court. As was said by Mr. Justice Stone, speaking for this court, in *Edward Hines Yellow Pine Trustees* v. *Martin* (1924), 268 U. S. 458, 465:

> "* * * This Court is a court of review and it will not consider questions not raised or disclosed by the record brought to it for a review and which were not considered by the courts below."

Conclusion.

For the reason stated, respondent respectfully asks that the petition for Writ of Certiorari be denied.

Respectfully submitted,

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